APPENDIX E

Verizon Wireless Petition for Reconsideration of the Wireline Competition Bureau's April 1, 2011 Guidance Letter to USAC

I. INTRODUCTION

1. In this Order, we deny Verizon Wireless's petition for reconsideration of the Wireline Competition Bureau's (Bureau) letter directing the Universal Service Administrative Company (USAC) to implement certain caps on high-cost universal service support for two companies, known as the company-specific caps.[1]

II. BACKGROUND

2. In October 2007, as a condition of the Commission's approval of ALLTEL's merger with Atlantis Holdings, Inc., the Commission imposed a cap on high-cost, competitive eligible telecommunications carrier (competitive ETC) support provided to ALLTEL.[2] The Commission imposed a similar interim cap on AT&T when it merged with Dobson Communications Corporation.[3] The caps were not self-executing, however, and required administrative actions to implement. Before the caps were implemented, the Commission issued the *Interim Cap Order*, establishing an industry-wide cap on high-cost, competitive ETC support.[4] The industry-wide cap "supersede[d] the interim caps on high-cost, competitive ETC support adopted in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*."[5]

3. On August 21, 2009, USAC sought guidance from the Commission on how and whether to implement the Commission's Orders imposing the company-specific caps.[6] USAC explained that it "believes that it is required to implement the orders AT&T and ALLTEL company-specific caps for the time period each respective order was in effect until the date it was superseded . . . because the [competitive ETC] industry-wide cap was effective prospectively and did not state that it superseded the company-specific caps retroactively."[7] USAC further stated that "[t]he company specific caps were not implemented prior to the CETC industry-wide cap for administrative reasons only. . . . At the written

---

[1] Letter from Sharon E. Gillett, FCC, to Richard A. Belden, USAC, 16 FCC Rcd 5034 (Wireline Comp. Bur. 2011) (*Guidance Letter*); Verizon Wireless Petition for Reconsideration, WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45 (filed May 2, 2011) (Petition).

[2] *Applications of Alltel Corporation, Transferor, and Atlantis Holdings LLC, Transferee for Consent to Transfer Control of Licenses, Leases and Authorizations*, WT Docket No. 07-128, Memorandum Opinion and Order, 22 FCC Rcd 19517, 19521, paras. 9-10 (2007) (*ALLTEL-Atlantis Order*).

[3] *Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 07-153, Memorandum Opinion and Order, 22 FCC Rcd 20295, 20329-30, paras. 71-72 (2007) (*AT&T-Dobson Order*). Both the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order* noted that the caps would be replaced when the Commission adopted comprehensive universal service reforms. *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19521, para. 9; *AT&T-Dobson Order*, 22 FCC Rcd at 20329, para. 71.

[4] *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008) (*Interim Cap Order*).

[5] *Id.* at 8837 n.21.

[6] *See* Letter from Richard A. Belden, USAC, to Julie Veach, FCC, WC Docket Nos. 05-337, 06-122, at 5 (filed Aug. 24, 2009) (USAC Guidance Request Letter).

[7] *Id.*

direction of Commission staff, however, USAC did not [subsequently] implement the company-specific caps" for that time period.[8]

4. The Bureau responded to USAC's guidance request and directed USAC to implement the company-specific caps from the date each merger took effect until the effective date of the industry-wide cap.[9] The Bureau stated that each cap was "imposed as a condition of the Commission's approval of a merger" and "the later *Interim Cap Order* superseded the company-specific orders; it did not, however, have any retroactive effect or nullify the prior orders."[10] Accordingly, the Bureau explained, the earlier Orders imposing the caps should be implemented for the time each was in effect.[11]

III. DISCUSSION

5. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original action or raises additional facts not known or existing at the petitioner's last opportunity to present such matters.[12] Verizon Wireless has not done so.

6. Verizon Wireless's primary argument is that the Bureau misinterpreted what the Commission meant when it said, in the *Interim Cap Order*, that the industry-wide cap "supersede[d]" the not-yet-implemented company-specific caps on high-cost support.[13] Specifically, Verizon Wireless argues that the Commission's use of the word "supersede" in that Order meant that USAC should have "implement[ed] the industry cap *instead of* the ALLTEL-specific cap, to the extent the latter had not yet been implemented."[14] This is so, Verizon Wireless contends, because according to Black's Law Dictionary, the word supersede means "'annul, make void, or repeal by taking the place of,'"[15] which "inherently includes the concept of annulling and making void the requirement or obligation that has been superseded."[16]

7. We disagree. As the Supreme Court has explained, "the term 'supersede' ordinarily means 'to displace (and thus render ineffective) while providing a substitute rule.'"[17] That is precisely what the *Interim Cap Order* did—it displaced the company-specific caps and provided a substitute rule. We do not think the term supersede necessarily carries with it the special additional meaning Verizon Wireless ascribes to it: that a rule that is superseded should be treated as though it never existed, but only to the precise extent that it had not already been applied. Rather, the question of which rule to apply when

---

[8] *Id.*

[9] *Guidance Letter*, 16 FCC Rcd at 5035.

[10] *Id.*

[11] *Id.*

[12] *See Petition for Reconsideration by National Association of Broadcasters*, 18 FCC Rcd 24414, 24415, para. 4 (2003). *MetroPCS Communications, Inc.*, AU Docket No. 08-46, Order on Reconsideration, 25 FCC Rcd 2209, 2213, para. 13 (Wireless Telecomm. Bur. 2010); *Christian Voice of Central Ohio, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 15943, 15944, para. 2 (2008).

[13] *See Guidance Letter*, 16 FCC Rcd at 5035.

[14] Petition at 4 (emphasis added).

[15] *Id.* (quoting Black's Law Dictionary1576 (9th ed. 2009)).

[16] Petition at 4.

[17] *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999).

considering circumstances that existed in the past, when new law has superseded (that is, displaced or replaced) old law is a distinct one, and a substantial body of law addresses that very issue in various contexts.[18]

8. The Supreme Court's usage of the term "supersede" is consistent with our view. For example, in *H.P. Welch Co. v. New Hampshire*, appellant, a commercial freight carrier, argued that it could not be punished for violating New Hampshire's statute limiting the amount of time a commercial driver could operate a vehicle.[19] Prior to the time the company had committed the violations, Congress had enacted a statute that empowered the Interstate Commerce Commission (ICC) to establish rules governing the same issue. The ICC subsequently issued such regulations, though they had not yet gone into effect. The Court "assume[d] . . . that when the federal regulations take effect they will operate to supersede the challenged provisions of the state statute."[20] But, the Court continued, the relevant question was "whether Congress intended, that from the time of the federal enactment until effective action by the Commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in interstate commerce."[21] The Court concluded that Congress did not intend such a result: "it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place."[22] Nothing in the Court's opinion suggested that a different case would have been presented if the state had waited until after the federal rules went into effect before initiating the proceedings. Yet if the Court used the term "supersede" in the sense that Verizon Wireless claims, the superseded state statute could not be applied once federal rules superseded it—even to conduct occurring before the effective date of the federal regulations.[23] That, however, is precisely the result the Court rejected.

9. Verizon Wireless's other definitional arguments are no more persuasive. Verizon Wireless argues that the word "supersede" in the *Interim Cap Order* should be understood to mean the same thing as the word "supersedeas" in the venerable writ of that name. A writ of supersedeas, as Verizon Wireless correctly notes, is a writ commanding an officer not to execute another writ the officer might be about to execute.[24] So, according to Verizon Wireless, the *Interim Cap Order* should be understood to be a writ commanding USAC not to execute the Commission's previous instruction to it regarding the company-specific caps. We think, however, that the fact that there is a particular writ that uses the Latin word for

---

[18] *See, e.g.*, *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (discussing how to determine whether to apply a new rule announced by the Supreme Court in criminal cases at various stages of review); *Danforth v. Minnesota*, 552 U.S. 264 (2008) (holding that state courts may give greater retroactive effect to Supreme Court decisions than is required under the line of cases discussed in *Whorton*); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (discussing retroactivity in both civil and criminal contexts).

[19] 306 U.S. 79 (1939).

[20] *Id.* at 84.

[21] *Id.*

[22] *Id.* at 85.

[23] We do not think it makes a difference that the company-specific caps on high-cost support had not been implemented and applied against any carrier while our example of a freight carrier involves a regulation that had been applied against others but not against the carrier in question. The question is whether, when a new rule "supersedes" an old rule, the fact that the old rule has been "superseded" means that it cannot be applied for the time period when it was in effect. We do not see why whether it can be applied against one entity would depend on whether it has previously been applied to another.

[24] *See* Petition at 5.

supersede and that has a very specific function does not mean that the word can only be used to mean precisely what it means in the context of that writ—just as we do not think that the word "body" can mean only what it means in the context of a writ of habeas corpus. Nor do we find any of Verizon Wireless's citations to Commission or judicial authority helpful to Verizon Wireless's argument, as none of them involve the use of the word "supersede" in a context where it actually had the effect that Verizon Wireless claims it ought to have here.[25]

10. Verizon Wireless next argues that implementing the company-specific caps now would be inconsistent with the Commission's goal in adopting them, which was "to limit the size of the universal service fund and, thereby, to reduce the demand for contributions borne by consumers."[26] Had USAC implemented the company-specific caps earlier, support recaptured from Verizon Wireless would result in a reduction of the contribution factor borne by consumers pursuant to section 54.709(b) of the Commission's rules. As Verizon Wireless explains, however, the Commission temporarily waived that provision in the *Corr Wireless Order*.[27] So, at the time the Bureau issued its guidance to USAC regarding the company-specific caps, amounts that USAC might collect in contributions (or amounts recaptured from carriers) beyond what was needed to fund the high-cost program would not result in reductions to the contribution factor, but instead would be reserved as a "down payment on proposed broadband universal service reforms."[28] In Verizon Wireless's view, this means that implementing the company-specific caps now would be inconsistent with the purpose the Commission had in adopting them, and, therefore, either unlawful or a mistake of policy.

11. We disagree. The reserve fund was created in order to provide funding for a variety of broadband universal service reforms.[29] As the Commission explained at the time, "[r]eserving funds now, rather than collecting them through a higher contribution factor at a later time, will . . . minimize[e] unnecessary volatility in the contribution factor, which would otherwise decline and then increase . . . . The reclaimed funds will also provide a continuing benefit to the universal service fund by earning interest until they are disbursed."[30] Verizon Wireless's argument thus misses the mark both conceptually

[25] We are also unconvinced by Verizon Wireless's claim that the Commission's intent was "clear" in the *Interim Cap Order* that the company-specific caps should not be implemented. *See* Petition at 8-10. Nor do we think the fact that the Commission did not refer to the company-specific caps in subsequent orders, where the effect of the company-specific caps was not at issue, to be particularly relevant. *See* Petition at 11-13. Verizon Wireless also points to the Commission's recitation in the *Corr Wireless Order* of an estimate from the National Broadband Plan of the amount of money that Verizon Wireless and Sprint Nextel received in 2008, which seems to have included the full amount each actually received, rather than reflecting the amount Verizon Wireless *would have received* in 2008 if the company-specific cap had already been implemented. *See* Petition at 11; *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854, 12856, para. 4 (2010) (*Corr Wireless Order*). We think the statement cannot bear the weight Verizon Wireless places on it. For one thing, the language in the *Corr Wireless Order* cites an estimate from the National Broadband Plan of the amount of money the carriers *actually received* in 2008, it does not claim to be an estimate that reflects adjustments like true-ups or the company-specific cap. For another, the *Corr Wireless Order* used the number only to provide context regarding the phasedown. The Commission's use of a number that was readily at hand in such a situation does not indicate anything in particular about whether it had decided not to implement the company-specific caps.

[26] Petition at 14 (citing *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19520-21, paras. 8-9).

[27] Petition at 15 (citing *Corr Wireless Order*, 25 FCC Rcd at 12862-63, para. 22).

[28] *Corr Wireless Order*, 25 FCC Rcd at 12862, para. 20.

[29] *Id.*

[30] *Id.*

and in the particulars. That is, by reserving funds, including funds recovered by implementing the company-specific caps, rather than reducing the contribution factor, the Commission will have funds available to disburse to support its reforms. That means a lower contribution factor, at that future time, than would otherwise be the case. And the point of the caps in that regard—both the company-specific caps and the later industry-wide cap—was not to achieve a particular contribution factor. Instead, it was to limit demand for funds and to control the overall size of the Fund. In other words, the goal was to cause the contribution factor to be lower than it otherwise would be absent such a cap. Reserving funds associated with the company-specific caps is consistent with that goal; the result will be a lower contribution factor than would otherwise be required to fund the reforms the Commission adopts today. Second, Verizon Wireless ignores the fact that funds in the reserve earn interest until they are disbursed. To the extent interest income reduces the need for contributions from consumers, the use of the reserve fund directly supports the goal the Commission identified.

12. Verizon Wireless further argues that the Guidance Letter was incorrect to claim that implementing the company-specific caps would not require an adjustment to the industry-wide interim cap amounts. That is, under the *Interim Cap Order*, the interim cap amount for each state is based on the amount of support each competitive ETC in that state was eligible to receive in March 2008.[31] Verizon Wireless claims that the company-specific caps, if implemented, would have reduced the amount of high-cost, competitive ETC support those companies were eligible to receive in March 2008, and, therefore, the interim cap would need to be reduced accordingly, contrary to the Bureau's statement in the Guidance Letter.[32]

13. We disagree. As the Commission explained in the *Corr Wireless Order*, carrier-specific high-cost, competitive ETC support reductions do not influence the amount of the industry-wide cap.[33] To the contrary, "as long as [carriers] continue to be competitive ETCs . . . [they] remain *eligible* for high-cost support, even though they have agreed to surrender such support."[34]

14. Verizon Wireless also argues that it would be manifestly unjust for USAC to recapture the high-cost, competitive ETC support provided to ALLTEL, as ALLTEL—as it was required to do pursuant to Commission rules—already spent that money.[35] In this regard, Verizon Wireless complains that there was no way either ALLTEL or Verizon Wireless could have known that the Commission would later implement the company-specific caps.

15. We are not persuaded. As explained above, we disagree with Verizon Wireless about whether the Commission intended, in the *Interim Cap Order*, to declare that the company-specific caps would never be implemented. Because the Commission never said that the company-specific caps would not be implemented, we find that any assumption otherwise by ALLTEL or Verizon Wireless was unfounded. Nor does Verizon Wireless's repeated assertion that staff informed ALLTEL and USAC that the company-specific caps would not be implemented change our view, as informal staff guidance cannot bind the Commission.[36] In addition, we do not believe that directing USAC to implement the company-

[31] *Interim Cap Order*, 23 FCC Rcd at 8846, para. 27.

[32] Petition at 2-3.

[33] *See Corr Wireless Order*, 25 FCC Rcd at 12857-58, paras. 7-9.

[34] *Id.* at 12858, para. 10.

[35] Petition at 14-15.

[36] *See, e.g., Petition for Waiver of Section 61.45(d)*, Memorandum Opinion and Order, 21 FCC Rcd 14293, 14299, para. 15 (2006) (finding informal staff letters non-binding on the Commission); *C.F. Communications Corp. v.* (continued...)

specific caps now actually imposes any significant penalty on Verizon Wireless. Thus, to the extent that ALLTEL received and spent support that now must be returned, it was, in effect, simply the recipient of an interest-free loan.

16. Finally, Verizon Wireless argues that the Bureau failed to address its request for a waiver of the company-specific cap.[37] Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.[38] In considering whether to waive its rules, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[39]

17. We do not think Verizon Wireless has shown that good cause exists to grant a waiver in these circumstances. As discussed above, Verizon Wireless has not shown that implementing the company-specific caps will cause hardship or inequity to Verizon Wireless. In addition, the Commission already determined, when it imposed the company-specific caps as conditions of transactions in 2008, that those caps would serve the public interest. Moreover, as noted above, the funding that Verizon Wireless seeks to keep will directly advance the Commission's broadband reforms adopted today. We do not believe that the public interest would now be well served by declining to carry out the Commission's earlier Order.

(Continued from previous page)

Century Telephone of Wisconsin, Inc., Memorandum Opinion and Order on Remand, 15 FCC Rcd 8759, 8768-8769, para. 28 (2000) (finding unpublished letter rulings non-binding on the Commission when no party had actual knowledge of the letters); *Kojo Worldwide Corp. San Diego, California*, Memorandum Opinion and Order, 24 FCC Rcd 14890, 14894, para. 8 (2009) (rejecting argument that staff had promised non-enforcement of provisions of the Act); *Applications of Hinton Tel. Co.*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11625, 11637, para. 42 (1995) (noting that when staff advice is contrary to the Commission's rules, the Commission may enforce its rules despite reliance by the public). This is especially so when the advice is not confirmed by more formal communications.

[37] Petition at 22; Reply Comments of Verizon Wireless, WC Docket Nos. 06-122, 05-337 at 5 (filed June 20, 2011).

[38] *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[39] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

APPENDIX F

Petitions for Reconsideration of the *Corr Wireless Order*

1. For the reasons stated below, we deny two petitions for reconsideration of the Corr Wireless Order,2664 one filed by a group of carriers including Allied Wireless (collectively, "Allied Wireless"), and one filed by SouthernLINC Wireless and the Universal Service for America Coalition (collectively, "SouthernLINC").

1. Allied Wireless Petition for Reconsideration.

2. *Background.* In a pair of transactions in 2008, Verizon Wireless and Sprint Nextel each agreed to phase out high-cost universal service support over five years.[2665] In the *Corr Wireless Order*, the Commission implemented those commitments, and, as relevant here, provided Verizon Wireless and Sprint with two options for electing a baseline against which to measure the phase-out. Sprint elected Option A, under which it would be permitted to receive no more than a specified percentage of its 2008 high-cost support each year—80 percent in 2009, 60 percent in 2010, 40 percent in 2011, 20 percent in 2012, and no support in 2013.[2666] Verizon Wireless elected Option B, under which support would be calculated just the same as it otherwise would be, and then a carrier-specific further reduction would be applied, so that in 2009 it would receive 80 percent of the support it would otherwise receive, in 2010, 60 percent, in 2011, 40 percent, in 2012, 20 percent, and no support in 2013.[2667] Broadly speaking—and simplifying somewhat—Option A offered carriers certainty about their future caps and would maximize the amount the carrier would receive if its number of eligible lines were to decrease (which might happen if the carrier were relinquishing its ETC designations, for example), while Option B provided less certainty but would maximize the amount the carrier would receive if its number of supported lines were to increase (which might happen because of customer acquisition).

3. In the *Corr Wireless Order*, the Commission also directed USAC to "reserve any reclaimed funds as a fiscally responsible down payment on proposed broadband universal service reforms, as recommended in the National Broadband Plan."[2668]

4. Allied Wireless asserts that including Option B in the *Corr Wireless Order* was unlawful for two reasons. First, Allied Wireless argues that the Commission "violated" its "due process rights" as well as the Administrative Procedure Act (APA) because the Commission did not provide sufficient notice that it was "considering adopting a baseline methodology in this proceeding" or notice of the specific proposals under consideration.[2669] Allied also argues that the Commission's adoption of Option B was arbitrary and capricious.

[2664] *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854 (2010) (*Corr Wireless Order*).

[2665] *See id.* at 12854, para. 1.

[2666] *See id.* at 12860, para. 16 (setting forth Option A).

[2667] *Id.* at 12861, para. 17 (setting forth Option B).

[2668] *Id.* at 12862, para. 20. The Commission noted that to effectuate the decision to reserve these funds, two actions were required. First, for the purposes of calculating carrier contributions, it directed USAC to project that competitive ETC support in each state would be disbursed at the interim cap amount. Second, it temporarily waived section 54.709(b) of the Commission's rules, which normally requires that any excess contributions received in one quarter be used to reduce the required contribution factor for the next quarter. *See id.* at 12862, paras. 21-22.

[2669] Allied Wireless Petition for Reconsideration, WC Docket No. 05-337, at 12-13 (filed Oct. 4, 2010) (Allied Wireless Petition).

5. Allied Wireless also contends that the Commission's decision to reserve funds reclaimed from Sprint and Verizon Wireless, rather than to redistribute them to other carriers, was arbitrary and capricious. Specifically, Allied Wireless argues, "the Commission's decision that the *Interim Cap Order* does not require redistribution of the reclaimed support hinges on the agency's determination that Verizon [Wireless] and Sprint would remain 'eligible' to receive support even as this support is being surrendered" and that determination "is problematic" for a variety of reasons.[2670]

6. *Discussion.* We disagree with Allied Wireless that notice was required regarding the precise methodology for establishing the baseline for support to be phased down. The Commission required Sprint and Verizon Wireless to surrender support as a condition of its approval of transactions sought by those carriers. The Commission could have further specified in those adjudicatory Orders how the reductions would take place if the carriers accepted the conditions, but it did not. Instead, the Commission did so in the *Corr Wireless Order*. Importantly, that Order did not change any of the rules that govern how support calculations for carriers are generally made. Thus, Allied Wireless had no right protected by the APA or the Due Process Clause to notice and an opportunity to comment, because the Commission in the *Corr Wireless Order* only established the obligations it would impose on Verizon Wireless and Sprint as a part of those adjudicatory proceedings. Moreover, we are unaware of any precedent suggesting that any more notice was required to do in two orders what could have been done in one. We note that in a notice of proposed rulemaking released as part of the same Order, the Commission also proposed to make changes to the Commission's rules that *would* affect how support for carriers like Allied Wireless would be calculated.[2671]

7. We likewise are not persuaded by Allied Wireless's second argument that the Commission's adoption of Option B was arbitrary and capricious. Specifically, Allied Wireless claims, "the Commission[] [was wrong in its] assertion that '[r]egardless of the option [Verizon and Sprint] choose, implementation of these options will not have an impact on other competitive ETCs.'"[2672] To the contrary, Allied Wireless argues, "the selection of 'Option B' by Verizon will adversely affect all other competitive ETCs."[2673] If Verizon Wireless continues to gain lines in a state, claims Allied Wireless, it will receive a greater share of the support available under the interim cap, which results in a reduction of support for other competitive ETCs in that state.[2674] In contrast, Allied Wireless asserts, under Option A, support would not increase (and thus would not decrease for other carriers), because Option A uses a frozen baseline.

8. Allied Wireless is mistaken. As an initial matter, Allied Wireless misunderstands how the phasedown for Sprint and Verizon Wireless works. Under both Option A and Option B, support for Sprint and Verizon Wireless (and all other carriers) is calculated precisely the same way that it was calculated prior to the *Corr Wireless Order*, except that, following the final calculation of support under the rules applicable to all carriers, USAC performs an additional step to apply any necessary reduction to support for Sprint and Verizon Wireless. Specifically, USAC compares the amount that Sprint and Verizon Wireless would otherwise receive to each company's specific cap amount and then distributes to each company the lesser of the two amounts. In other words, Allied Wireless's concern about line growth by Verizon Wireless (which elected Option B) is equally applicable to Option A. Under both options, any increase in lines by Sprint or Verizon Wireless in any state would be taken into account in determining support available to other carriers under the interim cap in that state. And that is the same situation Allied Wireless and other competitive ETCs were in before Sprint and Verizon Wireless were subject to any

---

[2670] *Id.* at 16.

[2671] *See Corr Wireless Order*, 25 FCC Rcd at 12863-64, paras. 23-26.

[2672] Allied Wireless Petition at 15 (citing *Corr Wireless Order*, 25 FCC Rcd at 12860, para. 14).

[2673] Allied Wireless Petition at 10.

[2674] *Id.* at 9.

reductions. Put another way, both options have the same effect—which is to say no effect—on the calculation of support for Allied Wireless. But the larger point, and the fatal one for Allied Wireless's claim, is that Allied Wireless is simply incorrect to assert that Option B has some sort of effect on the calculation of Allied Wireless's support.

9. Allied Wireless's principal argument with respect to the reserve account takes issue with the Commission's conclusion that Sprint and Verizon Wireless remain "eligible" for support that they have agreed to give up. That determination is relevant to Allied Wireless because, under the terms of the *Interim Cap Order*, the amount of money each competitive ETC (like Sprint, Verizon Wireless or Allied Wireless) is eligible for determines how much support every other competitive ETC will receive. If Sprint and Verizon Wireless were not eligible for support they had agreed to give up, then more support would be available under the cap for carriers like Allied Wireless. We do not find Allied Wireless's arguments on this point persuasive; to see why requires some explanation of how USAC calculates support and applies the interim cap.

10. First, USAC calculates, for the number of lines each competitive ETC reports, how much support the carrier is eligible for under the identical support rule.[2675] For each state, USAC sums the amount that all competitive ETCs are eligible for under the identical support rule, and then compares that amount to the interim cap. If competitive ETCs are eligible for support exceeding the cap, USAC applies a state-specific reduction factor to ensure that support does not exceed the cap. As discussed above, to calculate final support amounts for Sprint and Verizon Wireless, USAC performs an additional step (and imposes a further reduction if necessary), to ensure that each carrier receives no more than it should pursuant to its support reduction plan.

11. As this description of the process makes clear, the question of what support a carrier is "eligible" for, in calculating the state-specific reduction factor for the purposes of the interim cap, is the amount that the carrier would receive, or is "eligible" for, under the identical support rule.

12. Understandably, Allied Wireless would have preferred the Commission to have adopted a different method to implement the reductions for Sprint and Verizon Wireless—one that would have resulted in Allied Wireless receiving additional support beyond that which it receives under the interim cap. But that does not mean that the Commission's chosen approach is arbitrary and capricious. Indeed, to the contrary, the Commission reasonably decided that the public interest would be better served by declining to redistribute that support.[2676] Though Allied Wireless wishes that the Commission would have had different view, it has not shown that the Commission's decision was unlawful.

13. Allied Wireless next argues that, contrary to the Commission's assertions otherwise, the support reductions imposed on Sprint and Verizon Wireless were not "voluntary," and, says Allied Wireless, this means that the Commission's conclusion that they remain "eligible" for support, as discussed above, "has no basis."[2677] But the reductions were voluntary: the Commission approved transactions involving each carrier on the condition that they give up support, and each carrier elected to go through with the transaction. Such a decision by a company is not an involuntary act. Even if Allied Wireless were right about that, however, its argument would still fail, because, as discussed above, the question of what support a carrier is "eligible" for, as relevant here, is the amount the carrier would receive under the identical support rule, not how much money the carrier is actually going to receive after all adjustments.

14. Allied Wireless also argues that construing Sprint and Verizon Wireless as "eligible" to receive the support they are not, in fact, receiving, violates section 254(e) of the Act, which requires that

---

[2675] *Interim Cap Order*, 23 FCC Rcd at 8846, para. 27.

[2676] *See Corr Wireless Order*, 25 FCC Rcd at 12858-59, paras. 10-11.

[2677] Allied Wireless Petition at 17-18.

carriers receiving support shall use it "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[2678] Allied Wireless argues that if Sprint and Verizon Wireless "were not compelled to relinquish support, but instead did so of their own free will, then [they] were violating the statute. Giving back the support forecloses any means of satisfying the statutory obligation to use the support in the manner specified in the statute."[2679] But Sprint and Verizon Wireless did not give back support—they agreed to have their support reduced over time. The statutory provision, by its terms, does not apply to support reclaimed in this manner. Allied Wireless's argument suffers a second flaw, as well: it proves too much. Again, the amount of support a carrier is eligible for, in this context, is the amount the carrier would otherwise receive, based on its line counts, under the identical support rule. But the amount that any carrier receives is governed by the interim cap, as well. All carriers in states where the interim cap has an effect receive less than they are "eligible" for. Thus, under its own theory, Allied Wireless, like Sprint and Verizon Wireless, is not receiving the support for which it is "eligible," and therefore is violating the statute.

15. Allied Wireless next argues that Sprint and Verizon Wireless's commitments to forego support "would make it impossible for them to sustain" their status as ETCs, and that the Commission "did not examine the extent to which either [carrier] in fact currently meets the requirements" of competitive ETCs.[2680] We conclude that neither argument has any bearing on the issues addressed in the *Corr Wireless Order*. If either carrier fails, either now or in the future, to satisfy any obligation imposed on it by virtue of its status as an ETC, that is a matter for the relevant designating entity in the first instance. Nor do we see why, in issuing an order detailing procedures for how support for the carriers would be reduced, the Commission was obliged to conduct any sort of investigation into whether they or their various operating company subsidiaries actually were, or ought to be, ETCs in the states where this Commission has granted ETC designation.

16. Allied Wireless's final argument is that the Commission's decision to reserve reclaimed funds was procedurally defective, because the Commission was obliged to provide notice and an opportunity for comment before it did so. That is not the case. The Commission established the temporary reserve in the *Corr Wireless Order* through two actions. First, for the purposes of calculating carrier contributions, it directed USAC to project that competitive ETC support in each state would be disbursed at the interim cap amount. The Commission's rules provide that the Commission has the authority and responsibility to review and approve USAC's projections and its calculation of the contribution factor each quarter without providing notice and an opportunity to comment.[2681] Second, the Commission temporarily waived section 54.709(b) of its rules, which normally requires that any excess contributions received in one quarter be used to reduce the required contribution factor for the next quarter. The notice and comment requirements in the APA only apply to rulemaking, however.[2682] Where, as here, the Commission relies on its general authority to waive one of its existing rules for good cause shown,[2683] it is thus not required to first provide notice and an opportunity for comment.

17. We note, moreover, that Allied Wireless has been provided an opportunity to comment on the Commission's decision to reserve reclaimed funds. In the *Corr Wireless Order*, in addition to deciding to reserve the funds reclaimed from Sprint and Verizon Wireless, the Commission issued a notice of proposed rulemaking seeking comment on its proposal to amend section 54.709(b) to enable the

[2678] 47 U.S.C. § 254(e).

[2679] Allied Wireless Petition at 18-19.

[2680] *Id.* at 19.

[2681] *See* 47 C.F.R. § 54.709(a)(2), (a)(3).

[2682] *See* 5 U.S.C. § 553.

[2683] *See Corr Wireless Order,* 25 FCC Rcd at 12862-63, para. 22 & n.46 (citing 47 C.F.R. § 1.3).

Commission to provide alternate instructions to USAC for implementing prior period adjustments.[2684] That, the Commission explained, would serve the same purpose as the temporary waiver of section 54.709(b) it adopted in the same Order.[2685] In other words, the Commission was seeking comment on its proposal to modify its rules to more readily do the very thing that petitioners fault the Commission for having done without providing notice. Any party that wished to comment on the merits of the decision to reserve funds had an opportunity to do so—and many parties did just that. In the Order, we consider and respond to such comments in adopting the proposed rule change, and we conclude that it is appropriate to create a broadband reserve account and modify our rules to facilitate the management of support funds accordingly.[2686] We also direct USAC to wind down the *Corr Wireless* reserve account. And we note that Allied Wireless, in its petition for reconsideration, did not identify any issue that it or any other party has raised or would have raised that we have not now addressed.[2687] For these reasons, we conclude that we are not required to alter our original decision to reserve funds or to provide additional opportunity for comment on that issue.

2. SouthernLINC Petition for Reconsideration

18. *Background.* SouthernLINC principally argues that the Commission had no authority to establish the broadband reserve fund under the Act, because if the Act did permit such a thing, the Act itself would be unconstitutional under both the Origination Clause and Taxing Clause.2688 It also challenges our action as arbitrary and capricious under the Administrative Procedure Act. We disagree on all points.

19. *Discussion.* The Origination Clause, which provides that a revenue bill must originate in the House of Representatives rather than the Senate, has no application here. The Supreme Court has explained that "a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause."[2689] The broadband reserve was not intended to "support Government generally." It was instead designed to (and the statute requires that it must) support universal service consistent with the requirements of section 254 of the Act. While SouthernLINC complains that the Commission was vague about precisely how those funds would be spent, we do not think that raises any issue under the Constitution. The Commission was not vague about whether the funds would be spent on universal service programs—as opposed to being deposited into the United States Treasury to support government operations generally—and that is sufficient.[2690] The relevant question under the Origination Clause is whether a statute "raises revenue to support Government generally," and in our view, the broadband reserve clearly does not.[2691]

[2684] *See Corr Wireless Order*, 25 FCC Rcd at 12863, para. 25.

[2685] *See id.*

[2686] *See supra* Part VII.H.1.

[2687] *Cf. U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005) (concluding that any failure to provide notice was harmless where petitioners could not identify any additional comment they would have made if notice had been properly given).

[2688] SouthernLINC Petition for Partial Reconsideration, WC Docket No. 05-337. CC Docket No. 96-45, at 7-11 (filed Sept. 29, 2010) (SouthernLINC Petition).

[2689] *United States v. Munoz-Flores*, 495 U.S. 385, 397-98 (1990).

[2690] *See Texas Office of Pub. Util. Counsel v. FCC,* 183 F.3d 393, 427 (5th Cir. 1999) (rejecting a similar Origination Clause challenge to the Commission's assessment of universal service contributions).

[2691] SouthernLINC also cites dicta in a footnote from *Munoz-Flores*, 495 U.S. at 400 n.7, seemingly to suggest that the reserve fund is unconstitutional because of an insufficient connection between the payors and beneficiaries of the fund. That would be so, SouthernLINC suggests, because there are no defined beneficiaries at all. We are not (continued...)

20. SouthernLINC's challenge under the Taxing Clause fails as well. SouthernLINC argues that the Act cannot be construed to permit the Commission to establish a tax, as opposed to a fee, because only Congress can create a tax. SouthernLINC further argues that the establishment of the broadband reserve must be understood to be a tax, rather than a fee, because the particular uses of the reserve fund were not established in the Order creating it.[2692] So, the argument goes, Congress could not, consistent with constitutional requirements, have delegated to the Commission the authority to establish the broadband reserve. We disagree.

21. As the Supreme Court has explained, "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that . . . applied to other nondelegation challenges."[2693] Accordingly, whether assessments for the broadband reserve are characterized as a "tax" or a "fee" has no relevance to SouthernLINC's nondelegation claim.[2694] In either case, the question in a nondelegation challenge is whether Congress has laid down an intelligible principle to guide the agency's actions.[2695] We have no doubt that section 254 satisfies that threshold.[2696]

22. We are similarly unpersuaded by SouthernLINC's APA arguments. SouthernLINC argues that the *Corr Wireless Order* was procedurally defective in two respects. Specifically, SouthernLINC argues that the Commission failed to give adequate notice before it directed USAC to calculate the universal service contribution factor without regard to actual projected disbursements for individual competitive ETCs and temporarily waived section 54.709(b) of the Commission's rules.[2697] The second of these complaints we have already discussed and rejected in the context of Allied Wireless's petition for reconsideration.[2698]

23. We are likewise unconvinced by SouthernLINC's assertion that the Commission must reconsider its decision to instruct USAC regarding how it should calculate projected demand for support. The Commission's rules provides that the Commission has the authority and responsibility to review and approve USAC's projections and its calculation of the contribution factor each quarter without providing notice and an opportunity to comment.[2699] We acknowledge that, by its terms, section 54.709(a)(3) of the Commission's rules only provides that the Commission has up to 14 days to make such adjustments following issuance of a public notice of the proposed contribution factor.[2700] But we do not think that

(Continued from previous page)

persuaded. The dicta SouthernLINC cites notes that a different case "might be present" if a funded program were "entirely unrelated" to the persons paying for it. *Id.* SouthernLINC apparently believes such a case would be different, though it makes no argument that it would be. In any event, this is not such a case. There is no less connection between these beneficiaries and payors and the beneficiaries and payors under any other of the support mechanisms provided for in section 254, and we do not think those raise any constitutional issue.

[2692] SouthernLINC Petition at 8-9.

[2693] *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989).

[2694] *See id.; see also Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988). The question whether an assessment is a tax or a fee is a relevant question under the Origination Clause, but, as explained above, assessments for the broadband reserve are fees for that purpose.

[2695] *Skinner*, 490 U.S. at 218-19.

[2696] Section 254(b) of the Act sets forth a list of principles on which the Commission and the Joint Board must base universal service policies. *See* 47 U.S.C. § 254(b)(1)-(7). And universal service contributions collected to subsidize those policies, once enacted, must be "equitable and nondiscriminatory." 47 U.S.C. § 254(d).

[2697] *See* SouthernLINC Petition at 11-16.

[2698] *See supra* paras. 16-17.

[2699] *See* 47 C.F.R. § 54.709(a)(2), (a)(3).

[2700] See 47 C.F.R § 54.709(a)(3).

provision forbids the Commission from instructing USAC to alter its projections prior to that time or in a different manner.[2701] Rather, it acts as a shot-clock provision, telling USAC that if the Commission has not acted to revise its projections within 14 days of the projections being published in a public notice, the calculated contribution factor set out in the public notice shall take effect. In other words, the rule simply provides guidance to USAC—it provides no rights to a party like SouthernLINC. Even if the rules were construed as SouthernLINC seems to suggest, however, we conclude that any deviation was harmless: By instructing USAC to alter its projections in advance, the Commission provided more notice than it would have provided if it followed the procedure set forth in section 54.709(a)(3).

24. SouthernLINC's final argument is that the Order was arbitrary and capricious because the Commission allegedly did not provide an adequate explanation of why it did not permit support reclaimed from Sprint and Verizon Wireless to be redistributed to other competitive ETCs under the identical support rule.[2702] That is because, according to SouthernLINC, the Commission is required to provide support under the identical support rule until that rule is replaced by another rule. We conclude that SouthernLINC's argument on this point is moot, because we have now done what SouthernLINC claims we were required to do—we have eliminated the identical support rule. Even if we had not done so, however, we would reject SouthernLINC's argument. At the time SouthernLINC filed its petition for reconsideration, the identical support rule was not the only rule that determined the amount of support. Instead, support for competitive ETCs like SouthernLINC was capped under the *Interim Cap Order*.[2703] And, as explained above, nothing in the *Corr Wireless Order* altered how support for SouthernLINC or other competitive ETCs was calculated.[2704] Though SouthernLINC does not develop its argument on this point, it appears that its complaint, based on the theory that carriers like it are entitled to support under the identical support rule, is directed against the *Interim Cap Order*, in which the Commission capped competitive ETC support and ceased providing support solely under the identical support rule. The time for revisiting that Order has long since passed, and we decline to do so now.

[2701] Indeed, this is not the first time that a contribution factor projection was altered outside the 14-day window provided for in 47 C.F.R. § 54.709(a)(3). *See* Proposed Fourth Quarter 2005 Universal Service Contribution Factor, 20 FCC Rcd 14683, 14684 (Wireline Comp. Bur. 2005) (adjusting USAC projections to account for Hurricane Katrina in the Public Notice setting out the proposed contribution factor, and noting that the Commission would have 14 days to alter those projections pursuant to 54.709(a)(3)).

[2702] *See* SouthernLINC Petition at 16-17.

[2703] 23 FCC Rcd 8834.

[2704] *See supra* paras. 6-7.

APPENDIX G

Rural Association Proposed Rule Changes for USF Reform

TABLE OF CONTENTS

Part 32 – Uniform System of Accounts for Telecommunications Companies

* * *

Subpart E – Instructions for Expense Accounts

* * *

§ 32.6540 Access expense.

(a) This account shall include amounts paid by interexchange carriers or other exchange carriers to another exchange carrier or network provider for the provision of carrier's carrier access. This account shall also include expenses related to facilities and bandwidth capacity associated with connecting the Broadband Access Service Connection Point to the Internet backbone (Middle Mile expense).

(b) Subsidiary record categories shall be maintained in order that the entity may separately report interstate and intrastate carrier's carrier expense. Such subsidiary record categories shall be reported as required by Part 43 of this Commission's Rules and Regulations.

* * *

Part 36 - Jurisdictional Separations

* * *

Subpart B – Telecommunications Property

* * *

CENTRAL OFFICE EQUIPMENT

* * *

§ 36.126 Circuit equipment – Category 4.

(a) For the purpose of this section, the term "Circuit Equipment" encompasses the Radio Systems and Circuit Equipment contained in Accounts 2230 through 2232 respectively. It includes central office equipment, other than switching equipment and automatic message recording equipment, which is used to derive communications transmission channels or which is used for the amplification, modulation, regeneration, testing, balancing or control of signals transmitted over communications transmission channels. Examples of circuit equipment in general use include:

(1) Carrier telephone and telegraph system terminals.

(2) Telephone and telegraph repeaters, termination sets, impedance compensators, pulse link repeaters, echo suppressors and other intermediate transmission amplification and balancing equipment except that included in switchboards.

(3) Radio transmitters, receivers, repeaters and other radio central office equipment except message switching equipment associated with radio systems.

(4) Composite ringers, line signaling and switching pad circuits.

(5) Concentration equipment.

(6) Composite sets and repeating coils.

(7) Program transmission amplifiers, monitoring devices and volume indicators.

(8) Testboards, test desks, repair desks and patch bays, including those provided for test and control, and for telegraph and transmission testing.

(b) For apportionment among the operations, the cost of circuit equipment is assigned to the following subsidiary categories:

(1) *Exchange Circuit Equipment - Category 4.1.*

(i) Wideband Exchange Line Circuit Equipment - Category 4.11.

(ii) Exchange Trunk Circuit Equipment (Wideband and Non-Wideband) - Category 4.12.

(iii) Exchange Line Circuit Equipment Excluding Wideband - Category 4.13.

(2) *Interexchange Circuit Equipment - Category 4.2.*

(i) Interexchange Circuit Equipment Furnished to Another Company for Interstate Use - Category 4.21.

(ii) Interexchange Circuit Equipment Used for Wideband Services including Satellite and Earth Station Equipment used for Wideband Service - Category 4.22.

(iii) All Other Interexchange Circuit Equipment - Category 4.23.

(3) *Host/Remote Message Circuit Equipment - Category 4.3*

(4) Middle Mile Circuit Equipment – Category 4.4

~~(4)~~ (5) In addition, for the purpose of identifying and separating property associated with special services, circuit equipment included in Categories 4.12 (other than wideband equipment) 4.13 and 4.23 is identified as either basic circuit equipment, *i.e.*, equipment that performs functions necessary to provide and operate channels suitable for voice transmission (telephone grade channels), or special circuit equipment, *i.e.*, equipment that is peculiar to special service circuits. Carrier telephone terminals and carrier telephone repeaters are examples of basic circuit equipment is general use, while audio program transmission amplifiers, bridges, monitoring devices and volume indicators, telegraph carrier terminals and telegraph repeaters are examples of special circuit equipment in general use. Cost of exchange circuit equipment included in Categories 4.12 and 4.13 and the interexchange circuit equipment in Categories 4.21, 4.22 and 4.23 are segregated between basic circuit equipment and special circuit equipment only at those locations where amounts of interexchange and exchange special circuit equipment are significant. Where such segregation is not made, the total costs in these categories are classified as basic circuit equipment.

~~(5)~~ (6) Effective July 1, 2001, through June 30, 2011, study areas subject to price cap regulation, pursuant to § 61.41, shall assign the average balances of Accounts 2230 through 2232 to the categories/subcategories as specified in §§ 36.126(b)(1) through (b)(4) based on the relative percentage assignment of the average balances of Accounts 2230 through 2232 costs to these categories/subcategories during the twelve month period ending December 31, 2000.

* * *

(g) Apportionment of Middle Mile Circuit Equipment Among the Operations.

(1) Middle Mile Circuit Equipment – Category 4.4. This category includes circuit equipment associated with connecting the Broadband Access Service Connection Point to the Internet backbone.

(i) Middle Mile Circuit Equipment shall be directly assigned to the Interstate Jurisdiction and allocated to private line services.

* * *

CABLE AND WIRE FACILITIES

* * *

§ 36.154 Exchange Line Cable and Wire Facilities (C&WF) – Category 1 – apportionment procedures.

(a) *Exchange Line C&WF-Category 1.* The first step in apportioning the cost of exchange line cable and wire facilities among the operations is the determination of an average cost per working loop. This average cost per working loop is determined by dividing the total cost of exchange line cable and wire Category 1 in the study area by the sum of the working loops described in subcategories listed below. The subcategories are:

Subcategory 1.1 - State Private Lines and State WATS Lines. This subcategory shall include all private lines and WATS lines carrying exclusively state traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes ten percent or less of the total traffic on the line.

Subcategory 1.2 - Interstate private lines and interstate WATS lines. This subcategory shall include all private lines and WATS lines that carry exclusively interstate traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line.

Subcategory 1.3 - Subscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services.

(b) The costs assigned to subcategories 1.1 and 1.2 shall be directly assigned to the appropriate jurisdication.

(c) Effective January 1, 1986, 25 percent of the costs assigned to subcategory 1.3 shall be allocated to the interstate jurisdiction.

(d)-(f) [Reserved]

(g) Effective July 1, 2001, through June 30, 2011, all study areas shall apportion Subcategory 1.3 Exchange Line C&WF among the jurisdictions as specified in § 36.154(c). Direct assignment of subcategory Categories 1.1 and 1.2 Exchange Line C&WF to the jurisdictions shall be updated annually as specified in § 36.154(b).

(h) *Additional Interstate Assignment.* Effective July 1, 2012 and in each calendar year thereafter, rate of return study areas shall increase the apportionment of Subcategory 1.3 Exchange Line C&WF investment to the interstate jurisdiction based on the Broadband Take Rate. The Broadband Take Rate is the ratio of study area Broadband Lines in service to total Broadband Lines and voice-only common lines in service. The Additional Interstate Assignment attributable to the Broadband Take Rate is equal to the excess of the Broadband Take Rate over 25 percent; *provided, however,* that where the Broadband Take Rate exceeds 50 percent, the portion of the Broadband Take Rate over 50 percent shall be reduced by one-half, such that the Broadband Take Rate for purposes of calculating the Additional Interstate Assignment shall not exceed 75 percent.

(i) The Additional Interstate Assignment produced by subsection (h) shall be phased-in as follows:

(1) 0.0415 for the period July 1, 2012 through December 31, 2012;

(2) 0.166 in 2013;

(3) 0.25 in 2014;

(4) 0.333 in 2015;

(5) 0.416 in 2016;

(6) 0.50 in 2017;

(7) 0.583 in 2018;

(8) 0.667 in 2019;

(9) 0.75 in 2020;

(10) 0.833 in 2021;

(11) 0.916 in 2022;

(12) 1.000 in 2023 and subsequent years.

* * *

§ 36.158 Middle Mile Cable and Wire Facilities (C&WF) – Category 5 – apportionment procedures.

(a) Middle Mile C&WF – Category 5. The cost of Middle Mile facilities and services used for connecting the Broadband Access Service connection Point to the Internet backbone.

(1) The cost of C&WF applicable to this category shall be directly assigned to the Interstate jurisdiction and allocated to private line services

* * *

Subpart D – Operating Expenses and Taxes

* * *

§36.354 Access expense--Account 6540.

(a) This account includes access charges paid to exchange carriers for exchange access service. These are directly assigned to the appropriate jurisdiction based on subsidiary record categories or on analysis and study.

(1) Beginning July 1, 2012, Middle Mile access expense shall be directly assigned to the Interstate jurisdiction and allocated to private line services.

* * *

§36.392 General and administrative—Account 6720.

(a) These expenses are divided into two categories:

(1) Extended Area Services (EAS).

(2) All other.

(i) Beginning July 1, 2012, for purposes of computing interstate cost assignments, General and Administrative Expenses shall be limited to the lesser of:

(A) The actual average monthly General and Administrative Expenses for the study period; or

(B) A monthly per-loop amount computed according to paragraphs (a)(2)(i)(B)(1), (a)(2)(i)(B)(2), (a) 2)(i)(B)(3) and (a) 2)(i)(B)(4) of this section, using study period average loops.

(1) For study areas with 6,000 or fewer working loops the amount per working loop shall be $42.337 - (.00328 x the number of working loops), or, $63,000 ÷ the number of working loops, whichever is greater;

(2) For study areas with more than 6,000 but fewer than 17,887 working loops, the monthly amount per working loop shall be $3.007 + (117,990 ÷ the number of working loops); and

(3) For study areas with 17,887 or more working loops, the amount per working loop shall be $9.562.

(4) Beginning, January 1, 2013, the monthly per-loop amount computed according to paragraphs (a)(2)(i)(B)(1) through, (a)(2)(i)(B)(3) of this section shall be adjusted each year to reflect the annual percentage change in the United States Department of Commerce's Gross Domestic Product–Chained Price Index (GDP-CPI).

(5) If a study area's monthly per-loop General and Administrative Expenses require limitation, the per-loop, per-month amount shall be multiplied by 12 months and then by total loops for use in determining maximum expenses permissible for interstate assignment.

(ii) General and Administrative Expenses not assigned to interstate pursuant to §36.392(a)(i)(A or B) shall be assigned to the intrastate jurisdiction.

* * *

* * *

Subpart F – Universal Service Fund

* * *

§ 36.606 Limitations on Loop Plant Capital Expenditures Eligible for Support

(a) For purposes of determining support limitations on loop plant capital expenditures for non-price cap carriers, the following definitions shall apply:

(1) *Total Loop Investment* is the current gross balance of loop investment adjusted for inflation using the Department of Commerce Gross Domestic Product Chain-type Price Index (GDP-CPI).

(2) *Total Allowed Loop Expenditure* is the amount of future loop plant that would qualify for support.

(3) *Annual Allowed Loop Expenditure* is the portion of the Total Allowed Loop Expenditure eligible for support in the investment year.

(4) *Excess Loop Expenditure* is the amount of loop plant investment in a given year that exceeds the Annual Allowed Loop Expenditure. The Excess Loop Expenditure may be carried forward to future years and be included in the future Annual Allowed Loop Expenditure to the extent permitted within the Total Allowed Loop Expenditure.

(5) *Loop Depreciation Factor* is the ratio of the total loop accumulated depreciation associated with the total loop investment. This calculation uses the depreciation and investment amounts of the Data Year.

(6) Data Year is defined as the year prior to the year the Annual Allowed Loop Expenditure is made.

(b) Beginning January 1, 2012, Telecommunications Plant In Service (TPIS) investment in unseparated (i.e. state and interstate) gross plant investment in Exchange Line Circuit Equipment Excluding Wideband Category 4.13, Wideband Exchange Line Circuit Equipment Category 4.11, Wideband and Exchange Trunk Cable and Wire Facilities (C&WF) Category 2, and Exchange Line Cable and Wire Facilities (C&WF) Subcategory 1.3 allowed for inclusion in annual data submissions and support calculations prescribed under this section and in conformity with §54.1104 include any capital expenditures as described in § 36.606(d) and any Excess Loop Expenditure, but cannot exceed the Annual Allowed Loop Expenditure.

(c) A company will determine the limitations on loop plant capital expenditures for inclusion in loop costs by application of the rules in this section to the loop portion of Account 2230, Central Office Transmission, and the loop portion of Account 2410, Cable and Wire facilities. The limitations on loop plant capital expenditures will be applied to Exchange Line Circuit Equipment Excluding Wideband Category 4.13, Wideband Exchange Line

Circuit Equipment Category 4.11, Wideband and Exchange Trunk Cable and Wire Facilities (C&WF) Category 2, and Exchange Line Cable and Wire Facilities (C&WF) Subcategory 1.3 through application of the categorization and subcategorization procedures prescribed in this section.

(d) For purposes of this section, the term "capital expenditures" equals the cost of loop plant booked to Account 2001, TPIS, including Account 2230, Central Office Transmission, and Account 2410, Cable and Wire Facilities during the Data Year. Such costs will be determined consistent with the requirements of §32.2000. Additionally, capital expenditures as used in this section will include the amounts, if any, charged during the Data Year to Account 2681, Capital Leases associated with accounts 2230 or 2410.

(e) For inclusion in Annual Allowed Loop Expenditure, capital expenditures must be for the addition to loop equipment and facilities as referenced in § 36.606(c) that support transmission of broadband between the carrier's central office and end user customer premises or for equipment in the carrier's central office that supports broadband connections for end user customers.

(f) Annual Allowed Loop Expenditure is equal to the Total Loop Investment multiplied by the Annual Allowed Loop Expenditure Factor, plus adjustments, if any, pursuant to § 36.606(i), but cannot exceed the Total Allowed Loop Expenditure.

(1) The Annual Allowed Loop Expenditure Factor is arrived at by applying the following formula:

Annual Allowed Loop Expenditure Factor = (0.15 * Loop Depreciation Factor + 0.05)

(2) The Total Allowed Loop Expenditure is the Total Loop Investment multiplied by the Loop Depreciation Factor. Total Loop Investment is calculated by taking the Data Year year-end balances of the categories and subcategories referenced in § 36.606(c) and adjusting these balances by applying the inflation factor based on Vintages where possible; otherwise the calculated year the loop plant was put in service. The inflation factor to be used will be based on the Department of Commerce GDP-CPI.

(3) Carriers subject to this section will recalculate Annual Allowed Loop Expenditure for each Data Year based on the procedures established in this section. In the event capital expenditures for loop plant are below Annual Allowed Loop Expenditure for a Data Year, there will be no carry forward to future years of unused Annual Allowed Loop Expenditure. The recalculation of Annual Allowed Loop Expenditure for each Data Year will reflect the revised Annual Allowed Loop Expenditure, Loop Depreciation Factor, Total Loop Investment, and Total Allowed Loop Expenditure for the preceding year-end. Year-end calculations will reflect plant additions, plant retirements and depreciation expense during the preceding year. This method will allow for increases in Annual Allowed Loop Expenditure from year to year in the event a low level of capital expenditures is made during a year.

(g) A carrier subject to this section will maintain separate records of accumulated Excess Loop Expenditure for accounts referenced in § 36.606 (c) for the assets in addition to the corresponding depreciation accounts. Excess Loop Expenditure for a year, for an account, are equal to capital expenditures for that account in excess of Annual Allowed Loop Expenditure for the year, if any. Excess Loop Expenditure for the Data Year for each account are added to an accumulated Excess Loop Expenditure account. In the event a carrier makes capital expenditures for an account at a level below Annual Allowed Loop Expenditure for the account, the carrier may reduce accumulated Excess Loop Expenditure effective the Data Year by an amount up to, but not in excess of, the amount by which Annual Allowed Loop Expenditure for the Data year exceeds capital expenditures for the account during the same year.

(h) Carriers subject to this section will follow the requirements for depreciation accounting and computation of depreciation rates prescribed at § 32.2000(g).

(i) A carrier subject to this section may make adjustments to the Annual Allowed Loop Expenditure for any given year for loop capital expenditures associated with any of the following: 1) areas where there are currently no existing wireline local loop facilities in the support study area, 2) areas where grants funds are used, 3) areas covered by a loan that was in place by January 1, 2012, and 4) projects where carrier, prior to January 1, 2012, had awarded a contract to vendor for construction. A carrier will add the applicable adjustment to the amount of Annual Allowed Loop Expenditure for the year in which the additions to plant are booked to Loop Plant in Service.

(j) In addition to the Annual Allowed Loop Expenditure, a carrier subject to this section may make normal maintenance and routine upgrades to its loop investment. Carriers will be allowed to invest up to five percent (5%) of the Total Loop Investment as described in § 36.606(f) per year. This annual amount shall not be factored into any limitation, cap or reduction of support listed in or as a result of § 36.606.

(k) For instances where a carrier has an Annual Allowed Loop Expenditure that is less than $4 million, the carrier shall be allowed to increase their Annual Allowed Loop Expenditure to either $4 million or the Total Allowed Loop Expenditure, whichever is less.

* * *

CALCULATION OF EXPENSE ADJUSTMENT – ADDITIONAL INTERSTATE EXPENSE ALLOCATION

§ 36.631 Expense adjustment.

(a)-(b) [Reserved]

(c) Beginning January 1, 1988, for study areas reporting 200,000 or fewer working loops pursuant to § 36.611(h), the expense adjustment (additional interstate expense allocation) is equal to the sum of paragraphs (c)(1) through (2) of this section. After January 1, 2000, the expense adjustment (additional interstate expense allocation) for non-rural telephone companies serving

study areas reporting 200,000 or fewer working loops pursuant to § 36.611(h) shall be calculated pursuant to § 54.309 of this Chapter or § 54.311 of this Chapter (which relies on this part), whichever is applicable.

(1) Sixty-five percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 115 percent of the national average for this cost but not greater than 150 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area; and

(2) Seventy-five percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 150 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area.

(d) Beginning January 1, 1998, for study areas reporting more than 200,000 working loops pursuant to § 36.611(h), the expense adjustment (additional interstate expense allocation) is equal to the sum of paragraphs (d)(1) through (4) of this section. After January 1, 2000, the expense adjustment (additional interstate expense allocation) for non-rural telephone companies serving study areas reporting more than 200,000 working loops pursuant to § 36.611(h) shall be calculated pursuant to § 54.309 of this chapter or § 54.311 of this chapter (which relies on this part), whichever is applicable.

(1) Ten percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 115 percent of the national average for this cost but not greater than 160 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area;

(2) Thirty percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 160 percent of the national average for this cost but not greater than 200 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area;

(3) Sixty percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 200 percent of the national average for this cost but not greater than 250 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area; and

(4) Seventy-five percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 250 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area.

(e) Beginning April 1, 1989, the expense adjustment calculated pursuant to § 36.631(c) and (d) shall be adjusted each year to reflect changes in the size of the Universal Service Fund resulting from adjustments calculated pursuant to § 36.612(a) made during the previous year. If the resulting amount exceeds the previous year's fund size, the difference will be added to the amount calculated pursuant to § 36.631(c) and (d) for the following year. If the adjustments made during

the previous year result in a decrease in the size of the funding requirement, the difference will be subtracted from the amount calculated pursuant to § 36.631(c) and (d) for the following year.

(f) Subsequent to July 1, 2012, the interstate expense adjustment attributable to high cost loop support shall be adjusted pursuant to § 54.1103.

APPENDIX TO PART 36 – GLOSSARY

The descriptions of terms in this glossary are broad and have been prepared to assist in understanding the use of such terms in the separation procedures. Terms which are defined in the text of this part are not included in this glossary.

* * *

Broadband Access Service Connection Point - the network equipment located in a telephone company serving wire center where broadband traffic from one or more telephone company serving wire centers is aggregated.

* * *

Broadband Line – loop equipment and facilities that support transmission of voice and broadband data, or broadband data only, between the carrier's central office and end user customer premises, at a minimum downstream speed of 256 Kbps.

* * *

Middle Mile - broadband transmission facilities and services beyond the Broadband Access Service Connection Point as well as facilities and services necessary to connect to the Internet backbone.

* * *